FILE COPY.

Office Supreme Court, U.S.
FILED
JUN 9 1960
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. ~~994~~ 1384

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,

Petitioners,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LEON P. HOWELL
1412 Alamo National Building
San Antonio, Texas
Attorney for Petitioners

BRADFORD F. MILLER
519 Majestic Building
San Antonio, Texas
Of Counsel

INDEX

Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Rules Involved	4
Statement	5
History	5
Facts	8
Argument	11
Conclusions on Which Judgment Was Reversed Are Directly Conflicting	11
Court of Appeals Deprived Petitioners of the Rights Guaranteed to Them by the Seventh Amendment to the Constitution	16
Departure of the Court of Appeals from the Accepted and Usual Judicial Proceedings	42
Error of District Court in Holding Guarantor Liable on His Guaranty	50
Right of Court of Appeals to Direct Entry of Judgment for Respondent Where the Evidence Establishes That Some Money Was Owing on the Counterclaim	55
Summary	59
Conclusion	60
Appendix—	
A—Original Opinion Below	1a
B—Opinion Below on Petitioners' Rehearing	36a
C—Opinion Below on Respondent's Rehearing	40a
D—Judgment Below	43a
E—Orders on Rehearing Below	44a
F—Commercial Credit-Howard Corp Contract	45a

Citations

TABLE OF CASES

Atmoore Co. v. Dayless Mfg. Co., Inc., 208 F.2d 1 — 29
Broad River Lbr. Co. v. Middleby, 197 Fed. 817 — 39
Cameron v. First National Bank, 194 S.W. 469 — 54
Clark v. Mallory, 56 N.E. 1099 — 50
Ft. Worth & Denver Ry. Co. v. Janski, 223 F.2d 704 — 20
Hedger v. Reynods, 216 F.2d 202 — 49
Liberty Mutual Ins. Co. v. Thompson, 171 F.2d 723 — 19, 20
Lock v. Morris, 287 S.W.2d 500 — 28
Millers' National Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93 — 48
Phoenix Indemnity Co. v. Gironard, 252 F.2d 146 — 48
R. B. Spencer & Co. v. Thorp Springs Christian College, 41 S.W.2d 482 — 54
Revlon, Inc., v. Buchanan, 271 F.2d 795 — 59
Rice v. Webster, 18 Ill. 331 — 50
Seifert v. Brown, 53 S.W.2d 117 — 29
Sentilles v. Inter-Carribean Shipping Corp., 361 U.S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173 — 59-60
U. S. v. Wainer, 211 F.2d 669 — 50, 51
Woodsworth v. Commissioner, 218 F.2d 719 — 42
Wright v. Gordon's Transport, Inc., 162 F.2d 590 — 28, 29

TEXTS

Am. Jur., Vol. 15, p. 550, §141 — 33
Ann. Cas., Vol. 17, p. 381 — 29
C.J.S., Vol. 31, p. 1087, §311, — 28
C.J.S., Vol. 32, pp. 1113-4, §1040 (D) — 29
R.C.L., Vol. 10, p. 1098, §289 — 29
Tex. Jur., Vol. 17, p. 576, §240 — 28
Wigmore, Vol. IV, §1057 — 28
Wigmore, Vol. IV, §1058 — 28
Wigmore, Vol. IV, §1073 — 26

Wigmore, Vol. V, §1549 24
Wigmore, Vol V, §1556 24
Wigmore, Vol. V, §1557 36, 40-41
Wigmore, Vol. IX, §§2588-93 28

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution—

Seventh Amendment, U.S.C.A., Constitution, Vol. 3, p. 379 4

Rules—

Federal Rule of Civil Procedure 38 (a), 28 U.S.C.A. 4
Supreme Court Rule 19-1(b), 28 U.S.C.A. 60

Statutes—

28 U.S.C., §1254(1) 2
28 U.S.C., §2101(c) 2
28 U.S.C.A., §1732 20, 41
V.A.T.S., Art. 1327 54
V.A.T.S., Art. 5526 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

WILLIAM J. SORGEL, EXECUTOR OF THE ESTATE OF WILLIAM R. SORGEL, DECEASED, AND DOROTHY L. FOSTER,

Petitioners,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners, William J. Sorgel, Executor of the Estate of William R. Sorgel, Deceased, and Dorothy L. Foster, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which reversed a judgment of the United States District Court for the Western District of Texas. The District Court judgment had been entered in favor of Petitioners pursuant to a jury verdict in a civil action brought by Respondent against them for debt.

OPINIONS BELOW.

No opinion was rendered by the District Court.

The opinion of the Court of Appeals appears in Appendix A hereto, *post*, pages 1a-35a, is reported in 274 F.2d 449, 467. The opinion of the Court of Appeals granting in part and otherwise denying Petitioners' petition for rehearing appears in Appendix B hereto, *post*, pages 36a-39a, is not yet reported. The opinion granting Respondent's petition for rehearing appears in Appendix C hereto, *post*, pages 40a-42a, is not yet reported. These opinions are also to be found in the certified transcript of the record, Vol. VI, pages 1407-44, 1582-5, 1625-8.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 18, 1960, and appears in Appendix D hereto, *post*, page 43a. Petitioners' petition for rehearing was acted upon on April 11, 1960, and Respondent's petition for rehearing was acted upon on May 10, 1960. Appendix E, *post*, page 44a.

The jurisdiction of this Court is invoked under 28 U.S.C., §§1254(1) and 2101(c).

QUESTIONS PRESENTED.

1. Whether a federal appellate court can, after a jury verdict and judgment for Petitioners, deprive Petitioners of the rights guaranteed to them by the Seventh Amendment to the Constitution by reversing that judgment and directing entry of a money judgment for Respondent based

upon contradictory conclusions derived from the same facts.

2. Whether a federal appellate court can, after a jury verdict and judgment for Petitioners, reverse that judgment and direct entry of a money judgment for Respondent by

(a) resolving evidentiary conflicts *against* the parties prevailing in the District Court.

(b) rejecting or disbelieving the evidence which clearly presents a jury question.

3. Whether a federal appellate court may so far depart from the accepted and usual judicial proceedings that it can, after a jury verdict and judgment for Petitioners both in the main action and on the counterclaim, reverse that judgment and direct entry of judgment for Respondent by

(a) viewing the evidence *against*, rather than in favor of, the parties prevailing in the District Court.

(b) making fact-findings that are directly contrary to the evidence.

(c) substituting its fact-findings for those drawn by the jury from conflicting evidence.

(d) substituting its interpretation of technical accounting records and procedures for those testified to by the person charged with keeping the records and by certified public accountants who had examined the records and qualified as expert witnesses.

4. Whether the District Court erred in holding a guarantor liable upon his guaranty of a corporation's contract where

(a) the plaintiff sued all three of the guarantors and prior to trial dismissed two of them from its action, with prejudice, over the objection of the remaining guarantor.

(b) the authority of the officers acting for the corporation was specifically limited, by resolution, to entering into a *sales* contract and the contract they executed was a *lending* device.

5. Whether a federal appellate court can, after a jury verdict and judgment for Petitioners both in the main action and on the counterclaim, reverse that judgment and direct entry of a money judgment for Respondent where there is an evidentiary basis for the jury's verdict and the judgment entered thereon.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

3 U.S.C.A., 379, CONSTITUTION, AMENDMENT VII; Civil Trials:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to common law.

28 U.S.C.A., FEDERAL RULE OF CIVIL PROCEDURE 38(a); Jury Trial, Right Preserved:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE.

History.

The Respondent, Commercial Credit Corporation,[1] initiated this suit on July 1, 1954, in the Circuit Court, Milwaukee County, Wisconsin, against William R. Sorgel,[2] Dorothy L. Foster and Robert Howard, as joint and several guarantors of a contract that had existed between it and Howard Distributing Corporation.[3] The defendant, Dorothy L. Foster, had the cause removed to the United States District Court for the Eastern District of Wisconsin, on account of her diversity of citizenship, and it was thereafter transferred by that court, for convenience of the parties, to the United States District Court for Western District of Texas, San Antonio Division (R. I, 2-3).[4]

Howard Corp was a Texas corporation and operated a briefly prosperous merchandising business in San Antonio, Texas. William R. Sorgel, who resided in Ozaukee County, Wisconsin, owned 20% of its stock, his daughter, Dorothy L. Foster, and her husband, Edward L. Foster, each owned 15% and Robert Howard owned the remaining 50% of the stock. Robert Howard was the only officer and director of the corporation when it was dissolved by judicial forfeiture of charter, during the pendency of this suit, on October 24, 1955 (R. I, 34-6, 40).

---

1. For convenience in reference, hereafter called Commercial Credit.

2. William R. Sorgel died after the second trial of the cause and William J. Sorgel, executor of his estate, was substituted under Rule 25 (a) (1), F.R.C.P.

3. For convenience in reference, hereafter called, Howard Corp.

4. For convenience of the Court, the volume as well as the page of the record will be designated.

Respondent's suit sought recovery of alleged unpaid advancements of $41,790.12, interest in the amount of $39,739.87, expenses in the sum of $13,013.63, and attorneys' fees of $27,500.00. The advancements, interest and expenses were averred to be owing to Respondent by Howard Corp under a contract they entered into on April 28, 1953, and terminated on September 25, 1953 (R. I, 5-15).

The defendants, Sorgel and Foster, as shareholders of Howard Corp, filed a compulsory derivative counterclaim for that corporation's benefit, seeking to recover from Respondent overpayments growing out of the contract of approximately $65,158.87 (R. I, 34-6).

Prior to trial, Respondent voluntarily dismissed with prejudice its suit against the defendants, Howard and Foster, over the objection of, and after contest by, the remaining defendant, Sorgel (R. I, 3).

The cause was tried twice before a jury in the District Court. Following the first trial, the Trial Court on its own motion granted a new trial (R. I, 3). The cause proceeded to trial the second time and resulted in a jury verdict in favor of Petitioners, upon which findings judgment was rendered against Respondent on its main action and in favor of the shareholders on the counterclaim (R. I, 47-36, 94-8).

Respondent appealed from the judgment to the United States Court of Appeals for the Fifth Circuit (R. I, 100). Petitioners thereupon, to protect and present additional grounds for affirmance of so much of the judgment as decreed that Respondent take nothing by its suit, filed a cross-appeal based upon the failure of the Trial Court to sustain their motion for directed verdict (R. VI, 1390).

Respondent put to the Court of Appeals thirty-two points. Its principal points complained of the failure of

the Trial Court to grant its motion for directed verdict and its two motions for judgment *non obstante veredicto*, on the grounds its debt had been established as a matter of law and there was "no substantial evidence" to support the findings of the jury upon which judgment was rendered (R. I. 108-19). Petitioners, on their cross-appeal, advanced two specifications of error under their single point (R. VI. 1397).

The Court of Appeals reversed the lower court judgment and directed entry of judgment for Respondent, holding it was "without factual dispute" that Commercial Credit was entitled to recover the "*sum of $41,790.12, as principal amount due on July 12th*, $13,013.63 expenses covered by the contract, and $23,000.00 attorneys' fees" and remanded the cause to the District Court for the sole purpose of determining the amount of outstanding accounts receivable that were unpaid so that interest thereon could be computed (*post*, pages 32a-35a).

On Petitioners' petition for rehearing the Court of Appeals found and held that included in the principal sum of $41,790.12, for which it initially rendered judgment (*post*, page 35a), was "$7,315.57, which was 80% of $9,144.46 of accounts receivable assigned by Howard after September 25, 1953, the date of the termination of the contract, and for which Commercial Credit paid nothing" (*post*, page 37a). It amended and modified its opinion only to the extent of reducing the principal sum of $41,790.12, by the $7,315.57, and directed entry of judgment for Respondent accordingly holding, "on the record before us there was no substantial issue of fact as to appellant's right to recover the *sum of $34,474.55, as principal amount due on July 12th*, $13,013.63 expenses covered by the contract, and $23,000 attorneys' fees" (*post*, page 38a).

As to all other matters that petition for rehearing was denied (*post*, page 39a).

On Respondents' petition for rehearing the Court of Appeals set-aside the order entered on Petitioners' rehearing and reinstated the judgment under which the Court had initially concluded that the principal of the indebtedness owed by Howard Corp to Commercial Credit on July 12, 1954, was $41,790.12, holding, "The limited motion for rehearing [Respondent's] is granted and the original judgment and order of this Court dated January 18, 1960, is hereby REINSTATED." (*post*, pages 41a-42a).

Facts.

The contract[5] was executed by Howard Corp in San Antonio, Texas, on April 17, 1953 (R. I, 137). The guaranty was signed by the guarantors, Howard and Foster, also on that date in San Antonio, Texas (R. I, 138; II, 234-7), and was signed by the guarantor, Sorgel, at the request and in the office of Respondent in Chicago, Illinois, on April 22, 1953 (R. I, 133-4; V, 1204-5). The contract was thereafter accepted and executed by Commercial Credit in Chicago, Illinois, on April 28, 1953. Both instruments provide they are to be construed and governed by the laws of the State where the contract was accepted by Respondent (R. I, 137-8).

The guaranty was a continuing unconditional undertaking by the guarantors jointly and severally to pay and perform the obligations of the contract (R. I, 138).

On August 26, 1953, Respondent notified Howard Corp that it was cancelling the contract effective September 25, 1953, and same was terminated on that date (R. II, 258-

---

5. For convenience in reference by the Court, the pertinent provisions of the contract are included in Appendix F, *post*, pages 45a-47a).

9). Sorgel also terminated his guaranty on September 25, 1953 (R. II, 272-3).

The status of the Commercial Credit-Howard Corp account is determined, according to the contract, by taking the difference between the amount actually advanced by Respondent to Howard Corp on the accounts receivable while the contract was in force, and the amount Respondent recovered from the accounts receivable it acquired from Howard Corp. To which resultant figure would be added, if there was a debit against Howard Corp, or subtracted, if a credit resulted in its favor, any outstanding service charges on the accounts receivable "purchased" (paid 80% thereon), and expenses that were unpaid (R. I, 136-7). Since the evidence pertaining to whether Howard Corp was indebted to Commercial Credit, or vice versa, is the crux of Petitioners' argument it will be presented therein to avoid repetition.

Upon giving the notice of cancellation Respondent placed representatives in the office of Howard Corp to "look out fc Commercial Credit's interests." The first representative, W. F. Bracken, arrived around September 1, 1953, and was succeeded by one R. D. Weber on September fourteenth (R. II, 261, 346). Weber remained with the Howard Corp until about December 31, 1953 (R. II, 358).

While at Howard Corp, the representatives, acting for Commercial Credit, obtained additional accounts receivable for which it paid no money to Howard Corp (R. II, 267, 319, 338, 339, 376-8; V, 1026). These accounts receivable on which no advancements were made, totalled $46,723.40, of which $37,578.94 were procured between August 26, 1953 and September 25, 1953, and the remainder thereof amounting to $9,144.46 were acquired after the contract and guaranty terminated (R. V, 1121, 1172).

The first representative of Respondent spent considerable time, while with Howard Corp. in calling on account-debtors (R. II, 263-5) and his successor was occupied principally with writing collection letters, in the name of Howard Corp. to delinquent debtors (R. II, 357-8). Starting shortly after Respondent's representatives arrived in San Antonio, a large number of the account-debtors instead of paying their accounts returned the merchandise represented thereby, which merchandise was turned over to, stored by and in the name of, Respondent in various warehouses located in Denver, Oklahoma City, Dallas and San Antonio (R. II, 268-70, 361, 380-3; IV, 890, 902, 905, 907). By December 4, 1953, Respondent had moved the returned merchandise from all other warehouses and concentrated it in the Texas Bonded Warehouse at San Antonio (R. I, 13; II, 382-3; IV, 890-7).

This merchandise had been sold by Howard Corp for $68,445.36 (R. V, 1121-3), and the invoices covering same assigned to Respondent (R. II, 361, 392, 401; III, 635). The returned merchandise was placed under control of Respondent who exercised absolute dominion over it to the exclusion of Howard Corp and Petitioners (R. II, 268-70; IV, 882; V, 1082-3, 1090-4).

On March 2, 1956, Respondent had on hand only $42,013.93 of this returned merchandise (R. V, 1130-2), which was, upon its application, sold at judicial sale on that date for the nominal sum of $100.00 (R. V, 1216-17). The only withdrawals shown to have been made from the returned merchandise prior to the judicial sale amounted to $637.19 (R. V, 1139-46). Thus, leaving a discrepancy between the amount of such merchandise placed in Respondent's custody and that which it sold at the judicial sale of $25,794.44. The record is silent as to when or how Respondent disposed of this $25,794.44 of returned merchandise.

Respondent contended that, as of the date the contract and guaranty terminated, "there was a total of $67,355.55 in unpaid advancements (being 80% of the accounts assigned)" due it from Howard Corp which unpaid advancements "had been by the 12th day of July, 1954, reduced to the sum of $41,790.12, which basic sum is still due plaintiff under said contract." (R. I, 10).

This basic sum of $41,790.12 consisted principally of invoices of two account-debtors, one being Skillern & Son on which Respondent claimed to be due it the sum of $32,500.53 (R. III, 473-6; IV, 839-42; V, 1251-62), and the other is Ward Drug Company on which was due the sum of $1,409.18 (R. IV, 849-51); and, the remainder being the balance asserted to be owing on accounts receivable that Commercial Credit obtained after August 26, 1953, and for which it advanced no money to Howard Corp (R. III, 722-3, V, 1002-4, 1121, 1172, 1251-62).

ARGUMENT

Because of the length of the transcript of the evidence and the confused state of the record, the evidence deemed pertinent to the points relied on for allowance of the writ will be incorporated in footnotes for convenience in reference by the Court.

Conclusions on Which Judgment Was Reversed Are Directly Conflicting.

1. We need only look to the opinions of the Court of Appeals to ascertain that the evidence, from which it derived the amount of principal owed to Respondent by Howard Corp on July 12, 1954, was inconclusive and was held to be such by that Court (*post*, pages 32a-33a, 35a-39a).

and that the findings upon which it reversed the District Court judgment are contradictory.

(a) The Court of Appeals recognized that the principal of any debt Howard Corp might have owed to Respondent is evolved from the "gross face value" of only those accounts receivable "purchased" by Commercial Credit (advanced Howard Corp 80% thereon) while the contract was in force (*post*, pages 8a and 37a).

That Court then held there was a fact-issue as to the amount of accounts receivable Commercial Credit had actually "purchased" prior to the termination of the contract (*post*, pages 14a, 33a, 37a-38a); and, remanded the cause to the District Court for the purpose of having the amount of those accounts determined so that interest thereon could be computed (*post*, pages 35a and 38a).

In its original opinion, the Court predicated its finding as to the amount of principal on *all* of the accounts receivable Commercial Credit asserted were unpaid on July 12, 1954 and directed judgment to be entered in favor of Respondent for the sum of $41,790.12, as being the amount of principal due it from Howard Corp on that date (*post*, page 35a).

In the opinion on Petitioners' rehearing the Court of Appeals found "Commercial Credit's Exhibit B (plaintiff's Exhibit 15) *shows that the $41,790.12 figure is arrived at by charging Howard with '80% of the total accounts receivable unpaid at July 12, 1954'*", and based its findings as to the amount of principal on *the total of those accounts obtained while the contract was in force*, but without regard to whether they had been "purchased", *vel non* (*post*, page 37a).

That Court having held that the interest is computed upon, and the principal is derived from, the unpaid ac-

counts receivable "purchased" (paid Howard Corp therefor) while the contract was in force, it is axiomatic that if the evidence is conflicting as to the total amount of unpaid accounts receivable that were "purchased" for the purpose of computing the interest thereon, the same holds true as to the amount of those same accounts receivable for the purpose of taking 80% thereof in order to arrive at the amount of principal. If the evidence is inconclusive as to the amount of those accounts receivable for the first purpose it is just as inconclusive for the second.

The Court of Appeals having concluded there is a fact-issue to be determined by a jury as to the amount of unpaid accounts receivable Commercial Credit "purchased" while the contract was in force, and such determination having already been made by the jury, nothing was due to Respondent from Howard Corp on accounts at April 30, 1958 (R. I. 49), that finding is binding upon the appellate court.

(b) The Court of Appeals took cognizance of the fact that after August 26, 1953, at least $46,723.40 of accounts receivable were acquired by Respondent from Howard Corp which it did not "purchase", that is, pay Howard Corp 80% of their "gross face value" (*post*, page 14a).

The jury by its answers to Issues Nos. 14 and 15 (R. I, 54) found that Respondent acquired $46,723.40 of accounts receivable, for which it paid no money to Howard Corp, $37,578.90 of such accounts being obtained between August 26, 1953 and September 25, 1953, and $9,144.46 thereof after the contract terminated. Commercial Credit does not challenge the correctness of these findings. Nor were they disturbed by the appellate court (*post*, pages 1a-42a).

On Respondent's rehearing the Court of Appeals found that it had given full credit for $9,144.46 worth of accounts receivable which it did not purchase and same were in-

cluded in the 20% and 80% credits on July 12, 1954, of $15,342.59 and $19,579.81, respectively (*post*, page 41a).

This finding unmistakably conflicts with the Court's basic conclusions. It initially held that *none* of the "non-purchased" accounts were credited as payments against the Howard Corp indebtedness (*post*, pages 14a-20a) and continued to hold that the remaining $37,578.90 of "non-purchased" accounts were not so credited (*post*, pages 1a-42a).

These two credits total only $34,922.40, whereas, the "non-purchased" accounts receivable amount to $46,723.40. Further, Respondent alleged, and its records show (R. III, 575-6), that the total accounts receivable unpaid at July 12, 1954, was $76,712.52; and, even when the 100% ($46,-723.40) of these "non-purchased" accounts is deducted therefrom the balance remaining does not equal the $41,-790.12, but comes to only $29,989.12.

Thus, even under the findings of the appellate court and irrespective of which set of its figures is used, it is a certainty there is still included in the accounts receivable Respondent asserted to be unpaid at July 12, 1954, are $11,801.00 worth of "non-purchased" accounts obtained after August 26, 1953, ($46,723.40–$34,922.40=$11,801.00; also, $41,790.12–$29,989.12=$11,801.00). The Court of Appeals has, nevertheless, directed entry of judgment in favor of Respondent for 80% of *all* accounts receivable it asserted to be unpaid at July 12, 1954, or $41,790.12, as being the amount of principal owed on that date (*post*, pages 35a-42a).

(c) The jury, by its answers to Issues Nos. 1 and 14, necessarily found there were *no* unpaid accounts receivable outstanding on April 30, 1958 and that included in the accounts receivable asserted to be unpaid, on that date, were

all of the outstanding accounts for which Respondent advanced no money (see evidence set out in footnotes 15 and 16, *post*).

The Court of Appeals having correctly held that Commercial Credit is estopped from charging interest on accounts not "purchased" that it obtained after August 26, 1953 (*post*, page 33a), was compelled to hold, in order to be consistent, that Respondent cannot include in the alleged principal the 80% of the unpaid "non-purchased" accounts receivable obtained after August 26, 1953.

2. There are two additional conflicts in the legal conclusions on which the Court of Appeals reversed the District Court judgment.

(a) The District Court held that the contract was one for loans upon accounts receivable and the Court of Appeals in affirming said, "This Court having previously held as a matter of law that this was a loan contract, *Blackford* v. *Commercial Credit Corporation*, 5 Cir., 263 F.2d 97." (*post*, 3a).

It then held, "The great significance of this is that this contract *was* a sale of accounts receivable". (*post*, pages 4a-5a).

Although this latter conclusion is in direct conflict with the first, it was the basis upon which the Court of Appeals set aside the findings made by the jury in answer to Issues 6 and 7, submitting the defense of fraudulent misrepresentation (*post*, page 6a).

(b) After having first held this contract to be one for loans upon accounts receivable (*post*, page 3a; above quoted), the Court of Appeals then held that, under Section Second (a) thereof, "the contract between the customer, Howard, and Commercial Credit transferred full

title which Howard owned in all assigned accounts to Commercial Credit". This section, which the Court adopts, also provides that Respondent in addition to being vested with full title to such accounts receivable was, "*entitled to all of the ownership, title, rights, securities or guaranties possessed by customer* [Howard Corp] *in respect thereto and in respect to the property evidenced thereby*". (*post*, page 17a).

It was on this conclusion of absolute ownership by Commercial Credit of the accounts receivable and the merchandise represented thereby, that the Court of Appeals vacated the findings made by the jury in answer to Issues Nos. 10 and 12, and Issues Nos. 16 and 17, submitting the questions of whether Respondent exercised its option under Section Second (1) of the contract, to accept the returned merchandise it stored in various warehouses after August 26, 1953 and to accept the accounts receivable obtained after that date, on which no advancements were made by Respondent, as payments against the Howard Corp indebtedness (*post*, pages 18a, 23a-25a).

This contract was either a lending device or one for the sale of accounts receivable. It cannot be both. The findings of the Court of Appeals holding it to be a loan contract for some purposes and a sales contract for others are absolutely irreconcilable.

Court of Appeals Deprived Petitioners of the Rights Guaranteed to Them by the Seventh Amendment to the Constitution.

3. The Court of Appeals after having recognized the proper criteria to be used in arriving at the amount of the principal obligation under contract (*post*, page 8a), then concluded that the accountants for both the Respondent and Petitioners agreed that a balance of $67,355.55 was owing

to Commercial Credit by Howard Corp on September 25, 1953, when the contract and guaranty were terminated (*post*, page 20a) and proceeded to bottom its opinions on that conclusion (*post*, pages 8a-9a, 35a, 42a).

The evidence is, that there would be owing to Respondent, as of the date the contract terminated, if all of its charges against Howard Corp to that time were correct: according to Respondent's accountant, Rossiter, $16,677.49[6]; according to Respondent's officer, Kratz, $19,497.09[7]; according to Respondent's ledger, $23,873.89[8]; and, according to Petitioners' accountant-witness, Montag, $10,821.45.[9] Against either of which sums the jury may have selected, it had the duty, under the charge of the Court, to offset the debits it concluded from the evidence were erroneous or fictitious (R. I, 47-8). Such debits included, *inter alia*, 80% of the unpaid portion of the $46,723.40 in accounts receivable, for which no payment was made by Respondent, that the

---

6. Cash advanced to Howard Corp, $176,080.08 (R. III, 689), less cash collected by Commercial Credit, $162,013.71 (R. III, 693) for a principal sum of $14,066.37, plus unpaid expenses, $15.84 (R. III, 704) and accrued but unpaid service charges, $2,595.28 (R. III, 701-3).

7. Cash advanced to Howard Corp, $178,946.55 (R. IV, 820-3), less cash collected by Commercial Credit, $162,013.71 (R. IV, 853) for a principal sum of $16,932.84, plus unpaid expenses, per its records, $18.72 (R. III, 649-60) and accrued but unpaid service charges, per its records, $2,545.53 (R. III, 649-60).

8. Cash advanced to Howard Corp, $200,243.51, less cash collected by Commercial Credit, $178,933.87, for a principal sum of $21,309.64, plus unpaid expenses, $18.72 and accrued but unpaid service charges, $2,545.53 (R. III, 649-60).

9. Cash advanced to Howard Corp, $177,670.91 (R. V, 1114), less cash collected by Commercial Credit, $169,413.71 (R. V, 1115) for a principal sum of $8,257.20 plus unpaid expenses, $18.72 (R. V, 1118) and accrued but unpaid service charges, $2,545.53 (R. V, 1117-8).

Court of Appeals held to be an improper charge against Howard Corp (*post*, pages 32a-33a, 37a-38a, 41a).

The testimony referenced in footnotes 6, 7 and 9, *ante*, as well as that of Rossiter, Kratz and Montag quoted hereafter in footnotes 10, 11 and 12, negates the findings of the Court of Appeals that, "whatever testimony was given by appellant's accounting witnesses and by appellees' one accountant witness, Montag, relating to what we have above referred to as the basic figures, *is given from these ledger sheets*" of Respondent (*post*, pages 8a-9a, 41a-42a). This finding, which was the basis for the Court's conclusion that both sets of accountants agreed $41,790.12 was the correct amount of principal due Respondent, being invalidated by such testimony, the conclusion drawn thereon is also nullity.

The further vice in the Court of Appeals' conclusion, that by reason of Montag's testimony reconciling to the figure of $67,355.55 (the total amount the Court said was due Respondent on September 25, 1953) on cross-examination he thereby admitted the correctness of such figure, is:

First. Respondent plead that the $67,355.55 was the amount of "unpaid advancements (being 80% of the accounts assigned)" due it at September 25, 1953. (R. I, 10), *and not the total amount owing on that date*, as was held by the appellate court (*post*, pages 8a-9a, 20a). Thus, the finding of the Court of Appeals is contrary to Respondent's own pleadings.

Second. There is no statement of accounts prepared by Rossiter contained in the record of this case showing a balance of $67,355.55 due Commercial Credit from Howard Corp as of September 25, 1953; Rossiter testified such amount was $68,128.53 (R. III, 668-9). Hence, there being

no factual basis for such cross-examination, the testimony obtained thereon has no probative value.

Third. The figures used by Montag in the reconcilement were for the purpose of such hypothesis only. They were not the "basic figures" to which he had testified on direct examination, as shown by Montag deliberately omitting the "principal sum" he had testified to of $8,257.20 (R. V. 1114-5), and his use of the September service charges in the sum of $723.23 and the September telephone charges of $2.88, rather than all of the expenses that were unpaid on September 25, 1953, of $18.72 and the total service charges unpaid to that date of $2,545.53 (R. V. 1117-8; see footnote 9, *ante*).

Fourth. Montag explained he did not agree with Commercial Credit's application of credits and debits in arriving at such figure (R. V. 1198-9); viz., Respondent's inclusion therein of accounts for which Commercial Credit made no payment to Howard Corp. a $13,098.94 n.s.f. check and $32,500.53 allegedly due from Skillern & Son (see points 4 and 5, *post*).

The contradiction between Montag's testimony on direct and cross-examination, if in fact there be any, was subject to the explanation he gave and thus a question to be resolved by the jury. In *Liberty Mutual Insurance Co. v. Thompson*, 171 F.2d 723, 726 (C.A. 5) the Court held:

> "Moreover, it is the function of the jury, if it sees fit, to reconcile the testimony of any witness who has made inconsistent statements, or believe only such parts of his evidence as it deems worthy of belief; and the jury is not required to reject the testimony of any witness merely because there are conflicts therein."

Montag was offered as an expert witness (R. V. 1103-4). Assuming, *arguendo*, that his testimony could be con-

strued to be an admission, it was the opinion of an expert witness and thus, not binding upon Petitioners: *Ft. Worth & Denver Ry. Co. v. Janski*, 223 F.2d 704 (C.A. 5).

The opinion here under attack is in direct conflict with the decisions in the *Liberty Mutual Insurance* and *Ft. Worth & Denver Ry. Co.*, cases, *supra*.

4. Respondent had debited three items against Howard Corp. before the contract and guaranty terminated, that entered into the final accounting on which it asserted a principal indebtedness due from Howard Corp of $67,355.55 at September 25, 1953, the correctness of which items was challenged by Petitioners.

The first of these debit-items relates to an alleged check of Howard Corp for $13,098.94 it purportedly drew in favor of, and delivered to, Commercial Credit and payment thereof refused because of insufficient funds.

Respondent's ledger sheet which was admitted into evidence, under *28 U.S.C.A., §1732*, as its Exhibit No. 14 upon the testimony of Harry Kratz, the officer responsible for posting and maintaining the Commercial Credit records (R. III, 640-8; IV, 763-7), shows a debit-entry, dated September 1, 1953, for $13,098.94, bearing the notation, "CK. OF HOWARD NSF." (R. III, 649).

The opinion of the Court of Appeals considered the attack made by Petitioners against this one entry only (*post*, page 10a), and proceeds to hold that such item was a proper charge against Howard Corp (*post*, pages 12a-13a).

We will not trespass upon this Court's time by discussing the unfairly slanted findings and the dissertation in which the Court of Appeals indulges to reach its *non sequitur* (*post*, pages 10a-13a). That Court's action, however, in reweighing the evidence and its failure to mention

portions of the testimony which were favorable to Petitioners on this debit-item and its further failure even to consider the evidence disputing the correctness of other debit-items cannot be similarly passed over.

Respondent's accountant, Rossiter, testified that he included the alleged $13,098.94 n.s.f. check as a debit against Howard Corp in arriving at $41,790.12 being the amount owing by Howard Corp to Respondent, although he had never seen and did not know the date of the check or the reason it was not redeposited (R. III, 710-11).[10]

The officer-in-charge of Respondent's records, Kratz, testified that he had never seen the alleged $13,098.94 n.s.f. check, *that Commercial Credit did not have the check and had no record of it other than the entry on the ledger sheet*, nor did Commercial Credit have a record of deposit, or other bank records, of such check, and that the check was not presented to Respondent's accountant, Rossiter, dur-

---

10. "Q. That was all the money that Commercial Credit had put out as of that time, wasn't it?

A. There was in addition at that time unpaid checks—an unpaid check for $13,098.94.

Q. All right, sir. An unpaid check—

A. A Howard check remitted on report of collection number 4529, which was returned by the bank for n.s.f., and was never redeposited."

* * *

"Q. It was never redeposited. Do you know why?

A. No.

Q. *What was the date of that check?*

A. *That I don't have, because I have never seen the check.*

* * *

"Q. All right. But you don't know the date of the check?

A. No.

Q. You do not. All right, sir. In your opinion, then, you think this $13,098.94 should be added in as of September 25?

A. Yes."

ing the course of his examination of the Commercial Credit records (R. IV, 797-8).[11]

Petitioners' accountant-witness, Montag, testified that in making his audit of the Commercial Credit-Howard Corp account he had available and examined the Commercial Credit records and all of the books, records, files and accounts of Howard Corp (R. V, 1104-12), that he could find no record of the alleged $13,098.94 n.s.f. check having been issued by Howard Corp or received by Commercial Credit, that the amounts paid by Howard Corp to Respondent, as shown by the remittance reports, did not include a payment of $13,098.94, and that such reports agreed with their records (R. V, 1136, 1164, 1165-7, 1173, 1180-1, 1197).[12]

---

11. "Q. Now, do you have the $13,098.94 n.s.f. check which was supposedly given in payment of Collection Report Number 4528 dated August 27, 1953?"

A. The unpaid check for thirteen thousand dollars?

Q. $13,098.94.

A. No, I don't have that check.

Q. Where is it?

A. *I don't know where it is.* It was probably returned to Howard Distributing Corporation.

Q. *Did you, yourself, ever see that check?*

A. *I don't recall seeing it, no.*

Q. And Mr. Rossiter, I believe, testified he never saw the check, is that correct?

A. I don't recall what he said, Mr. Howell. *I haven't seen the check. It wasn't presented to Mr. Rossiter, I know that.*

Q. *Now, you have nothing to substantiate your entry with respect to that check, do you?*

A. *Except the entries on the ledger.*

Q. In other words, you don't have the check. *Do you have a deposit receipt* showing that the check was deposited and was returned?

A. That was one of those items that we could get a check to cover it, *if we paid the bank for it when it came back.*"

12. "Q. Mr. Montag, were you able to find any record of Howard Distributing Corporation having issued a $13,098.94 check, which is shown on the customer's ledger page?

Respondent's ledger sheet contains no credit-entry for the amount of $13,098.94 (R. III, 649-51). The remittance report No. 4529 embraces a number of separate transactions (R. V, 1184-91), and the consolidated entry thereof in the ledger sheet likewise embraces the same separate transactions (R. III, 649).

The fact that remittance Report No. 4529 is composed of a number of separate transactions totaling $23,984.46, including an itemized list of separate invoices amounting to $13,098.94, nullifies the Court of Appeals' conclusion,

---

A. No, sir."

* * *

"A. I have taken credit for the journal entry reported to be an n.s.f. check in the amount of $13,098.94.

Q. You've taken credit—

A. For which I have no record.

Q. —for a check of how much?

A. $13,098.94."

* * *

"Q. There's one additional thing that I can't understand. You say you charged Commercial Credit Corporation for that check for $13,098.94?

A. Yes, sir.

Q. *On what basis did you charge it to them?*

A. *I have no record that Howard gave them a check.*

Q. Well, if you have no record that Howard gave them a check, how do you charge them for it then?

A. *Well, the entry was picked up on Commercial Credit Corporation's records on the journal entry. I have no information pertaining to that journal entry. I don't even know what it is.*

Q. In other words, you could have taken that part of the Commercial Credit Corporation's records that says they got the check returned n.s.f. and charged it off as not being correct?

A. The remittance reports reflect that *I took the cash that was reflected by the remittance reports.* Normally, that would include only the checks from account debtors which Howard received and acted as an envoy and forwarded on to Commercial Credit. Now, I have no way of knowing whether $13,000 was paid by Howard for some of the account debtors

there was convincing evidence that the charge-back of the $13,098.94 n.s.f. check on September 1, 1953, was warranted by the entry of the proceeds of such remittance report on August 27, 1953 (*post*, page 10a). The only conclusion to be drawn from such an entry says *Wigmore, Vol. V*, §1549, is:

> "Again, the entry is not usable if it shows that it embraces in one item a number of *separate transactions*, or is in any way so loosely made that regularity of [*the*] entry cannot be predicated."

From the absence of an exact credit-entry for $13,098.94, *Wigmore, Vol. V*, §1556, states the conclusion is:

> "The *absence* of a debit-entry, in a book containing both debits and credits, should be regarded in effect as a statement that no such goods or services had been received * * * *Where, however, the book is offered by an opponent* (post 1557), *the absence of an entry of the transaction as claimed may properly be regarded as an admission that there was no such transaction* (ante, §1072)." (Emphasis added).

---

or what that $13,000 was. *I don't know that Commercial Credit Corporation ever received that $13,000 from Howard.*"

* * *

"Q. *Therefore you took one of their items which you had had no knowledge of before you had seen their books and accepted that, but you did not accept the other entry?*

A. *No, sir. I took the amounts off the report of remittances, which agreed with their records*" [Commercial Credit's].

* * *

"Q. * * * *Mr. Montag, do you find anywhere in that customer's ledger sheet of the Commercial Credit, where the $12,098.94 check was credited to Howard Distributing Corporation on that ledger sheet?*

A. *I can't identify it, no, sir.*

Q. *Well, do you find any such entries?*

A. *No, sir.*

Q. Such credit entry on there?

A. No, sir.

Although these principles are embraced in the section of *Wigmore* cited by the appellate court, it did not follow or apply them to the facts in this case (*post*, page 12a).

On this item the appellate court not only disregarded and rejected the evidence favorable to Petitioners, but reweighed the testimony and substituted its interpretation of the accounting procedures for those testified to by the witnesses.

The second debit-item consists of $40,625.66 of Skillern & Son invoices of which Respondent included 80%, or $32,500.53, in the principal sum for which the Court of Appeals directed entry of judgment against Petitioners (R. III, 473-6, 722-4; IV, 839-42; V, 1251-62).

Q. *Do you find on that ledger sheet anything to show that Commercial Credit Corporation actually received any such check?*

A. *No, sir*

Q. *Isn't it a fact that the only entry upon that ledger sheet with respect to the $13,098.94 check is the debit, that is, a charge against the Howard Distributing Corporation for that amount?*

A. *Yes, sir.*

Q. And the date of that is what, sir?

A. September 1st, 1953."

* * * *

"Q. Doesn't that show that that check was with that collection report, that $13,098?

A. That shows gross face amount of invoices, $23,984.46; amount credited, $23,984.46, cash received $20,708.28; *and there were some shortages, $3,276.18; and then there's some more information on the side, which evidently was put there by Commercial Credit.*"

* * *

"Q. Now, wouldn't your audit of the Howard books show that this check was remitted on that report?

A. I do not have a record of the customer's checks except on the original report of remittances.

Q. I'm talking about the Howard check. Would that come from anywhere else?

Commercial Credit placed in evidence as its Exhibit 22, *without any limitation*, the Howard Corp records pertaining to the Skillern & Son account, which lists, by dates, the invoices of Skillern & Son assigned by Howard Corp to Commercial Credit, the amount of each invoice and the payments made upon those invoices, showing a balance due of $884.60, as of February 11, 1954 (R. V, 1040-9). Thus, adopting the Howard Corp records, and thereby impeaching the entries in Commercial Credit's basic ledger sheet pertaining to that account. *Wigmore, Vol. IV, §1073.*

That is not the only use made of those records of Howard Corp by Commercial Credit.

Commercial Credit's Vice-President, Rogers, testified that Commercial Credit, on February 15, 1954, sent to Skillern & Son an "important legal notice" (Defendant's Exhibit 13, R. III, 615-9) listing, by dates, all invoices of Skillern & Son assigned to Commercial Credit, amount of each invoice and amounts paid thereon, showing a balance

---

A. *If it were a Howard check it would be entered in his records. He would have a check for that amount, or a copy of a check for that amount, if you received it and it was n.s.f.*

Q. It would not have gone back through his accounts, would it?

A. You should still have the check.

Q. I wasn't asking you that. *I said it would not have gone back through his accounts, would it?*

A. *It would have gone back.*"

* * *

"Q. * * * Now, I believe that Collection Report Number 4529, you testified, shows some balance of $13,098.94. May I see it, please? *There's nothing on that report, Mr. Montag, to show that the Howard Distributing Corporation ever issued a check for that, is there?*

A. *No, sir.*

Q. *And you found nothing in that check book or any other records to show that they ever issued a check for that amount, did you?*

A. *No, sir.*"

due of $884.60, for which payment was demanded; that its information as to the status of the account was obtained from Howard Corp and incorporated into that document (R. III, 473-5); *and that same was a correct statement of the account* (R. III, 476).

Kratz, under whose supervision Commercial Credit's records were maintained, testified that such records were untrustworthy as to the amount owing on the Skillern & Son account, that "we didn't know the exact condition of Skillern's account," and, therefore, requested and obtained the *copy of Howard Corp's ledger sheet on Skillern's* (Plf's Exhibit 22), reflecting the balance owing on that account as of February 11, 1954, to be $884.60, adopted and incorporated same verbatim into Commercial Credit's "important legal notice" which it directed to Skillern & Son on February 15, 1954, demanding payment of the $884.60 (R. IV, 839-42).[13]

---

13. "Q. I hand you here Defendant's Exhibit Number 13. Do you recognize it?

A. Yes, sir.

Q. What is it?

A. This is a statement of Skillern & Sons' accounts.

Q. What did you all call it?

A. Well, we listed this on an 'important legal notice.'

Q. All right, sir. Now, the balance shown on that is $844.60, isn't it?

A. That's correct."

• • •

"A *This statement was a statement that we had the Howard Distributing Corporation supply us with. We didn't know the exact condition of Skillern's account.*"

• • •

"Q. *Couldn't you have verified it against your records if you wanted to?*

A. *It couldn't have been verified against our records, Mr. Howell, because we have some forty thousand dollars worth of invoices that are unpaid on the Skillern account on our books.*

The act of Commercial Credit in placing into evidence the Howard Corp records pertaining to the Skillern & Son account; and, the testimony of Kratz and Rogers that Commercial Credit adopted and incorporated such Howard Corp records into Commercial Credit's "important legal notice" it sent to Skillern & Son demanding payment of the $884.60, were *judicial* admissions. *Wigmore, Vol. IV, §§1057 and 1058; Wright* v. *Gordon's Transport, Inc.*, 162 F.2d 590 (C.A. 5); *Lock* v. *Morris*, 287 S.W.2d 500, Tex. Civ. App. 1956 (ref. n.r.e.) and the authorities cited therein.

This testimony of Kratz, who was Respondent's official representative at the trial (R. I, 125, 154), and of Rogers, its Vice-President, also comes within the universally accepted rule, "the testimony given by or for a party may amount to a judicial admission and may be admitted and used against him as such at the same trial, or as primary evidence on a subsequent trial." *31 C.J.S. 1087, §311; 17 Tex. Jur. 576, §240; Wigmore, Vol. IX, §§2588-2593.*

Where a party introduces into evidence a written document, without limiting its purpose; he is held to be con-

---

Q. I understand that that's what you claim, but at that time you sent this notice to Skillern, you were claiming only $834.53, [$884.60] were you not?

A. That's right, because that's all Howard was claiming. They sent us the statement.

Q. *But Howard didn't send that statement to Skillern. You sent it, didn't you?*

A. *Yes, but we obtained the information from Howard which we sent to Skillern. We sent the notice.*

Q. *Why did you have to get the information from Howard?*

A. *Because we didn't know the condition of the Skillern account on their books.*

Q Did you know the condition of the Skillern account on your books?

A Yes, sir.

Q. *Well, why did you then go to Howard and get the information rather than take it off of your books?*

clusively bound by its recitations. *32 C.J.S. 1113-4, §1040 (D)*; *10 R.C.L. 1098, §289*; *17 Ann. Cas. 381, Seifert* v. *Brown*, Tex. Civ. App. 1932, 53 S.W.2d 117 (writ refused); *Atmoore Co.* v. *Dayless Mfg. Co., Inc.*, 208 F.2d 1 (C.A. 7-1953).

In the *Wright* case, *supra*, decided in 1947, it was said, "Plaintiff was bound by this testimony of his own witness." This holding is in accord with the law relating to the probative effect to be given the testimony of an official representative of a corporation-party. In the *Atmoore* case, *supra*, it is held that a party who introduces documentary evidence without limiting its purpose, is conclusively bound thereby. The opinion here under attack is in conflict with the federal decisions relating to the conclusive effect of evidence on the party offering it.

The third of these debit-items pertains to $1,409.18 due from Ward Drug Company, who operated stores in Dallas,

---

A. *Because we knew it would be foolish to send them out any statements from our books, because that isn't what they owed Howard.*

Q. *You didn't know what they owed Howard, did you?*

A. *No, not until we got the statement.*

Q. Or you didn't know what they owed you, did you?

A. We knew what was open on our books, sure.

Q. If you knew, why did you only send them a statement of *$843.35*? [884.60.]

A. Because we knew that all of those invoices weren't collectible."

* * *

"Q. You had collection reports on them did you not?

A. We had whatever collections Howard sent to us, that's right.

* * *

Q. Have they ever paid that amount?

A. No, they haven't.

* * *

Q. Did you ever make any demands upon them, other than for that *$834.53*? [$884.60.]

A. Not that I know of, no, sir."

Ft. Worth and Grand Prairie, Texas, which Respondent included in the principal sum of $41,790.12 (R. III, 649-54; IV, 849-51; V, 1259-62).

Respondent's accounting-witness, Kratz, identified the letter of which a notation is made in Defendant's Exhibit 13-B under "WARD DRUG STORES" (R. V, 1259). He then testified that such letter reflected Ward Drug offered to pay the $1,409.18 to Respondent, but Commercial Credit took no action with respect thereto (R. IV, 851) and permitted the account to remain uncollected for more than two years (R. V, 1005-6). As a consequence the account became barred by the Texas two-year statute of limitations, *Art.* 5526, *V.A.T.S.*[14]

It is manifest that the Court of Appeals not only reweighed the evidence pertaining to the alleged $13,098.94 n.s.f. check but disregarded and refused to consider the evidence bearing upon the Skillern & Son and Ward Drug accounts and failed to apply the proper evidentiary and legal tests thereto.

5. There were three additional items charged by Respondent against Howard Corp after the contract and guaranty terminated, that entered into the final accounting on which Commercial Credit asserted an indebtedness against Howard Corp of $94,533.62 as of April 30, 1958 (principal of $41,790.12, interest in the sum of $39,739.87, and expenses of $13,013.63), which were challenged by Petitioners.

---

14. "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

* * *

"4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

"5. Actions upon stated or open accounts * * *"

The first of these items concerns Respondent charging interest from July 12, 1954, to April 30, 1958, on $19,579.81 it had recovered from accounts receivable and applied as a net credit to Howard Corp on July 12, 1954.

The evidence conclusively shows that Respondent computed and charged interest from July 12, 1954, to April 30, 1958, on the $19,579.81 it had collected and credited on July 12, 1954. This interest is included in the total amount of service charges Respondent asserted to be due it (R. I, 11).[15]

---

15. Plaintiff's Exhibit 15—"Particulars of Claims Against Wm. K. Sorgel, etc.," prepared by Respondent's accountant, Rossiter (R. III, 675-6), shows:

	Recorded on Loan Control Card
"Total assigned accounts receivable unpaid at July 12, 1954	$76,712.50
"Deduct—Contingent reserve of 20% of unpaid accounts	15,342.59
"80% of assigned accounts receivable unpaid at July 12, 1954	$61,369.91
"Less reserve adjustment—Net credit resulting from schedules of assignments credited, collection reports, debits and credits, unpaid checks, checks on account, and miscellaneous adjustments	19,579.81
	$41,790.12"

Respondent's officer-witness, Kratz, testified:

> "Q. We know that. I am asking what the report shows—*it does not show that although the nineteen thousand five hundred and seventy-nine dollars was credited as cash against the outstanding accounts* as of *September 30, 1958* [July 12, 1954]. Commercial Credit continued to compute its interest upon the entire $76,712.50? (Parenthetical date supplied.)
>
> A. *That's correct.*
>
> * * *
>
> Q. He says those are nets.
>
> A. Yes, they are net credits, that's right.
>
> Q. That's a net credit, is it not, against the balance of $76,712.50?

The significance of this is two-fold. First, Commercial Credit is no more entitled to interest on money it recovered and applied to the Howard Corp. indebtedness than it is entitled to interest on accounts not "purchased" (paid no money thereon). Second, Respondent's charging of such service charges and the entry thereof in its records went to the credibility and weight the jury could give to those records.

The jury, by its answer to Issue No. 1, rejected Respondent's contention (R. I, 49). The Court of Appeals reversed that finding.

The second debit-item relates to expenses amounting to $170.25 for which Respondent had no proof except the entry in its records, nor did it produce documents to substantiate same (R. IV, 789-90, 791-2, 793; V, 990), and other expenses in the sum of $2,283.61 for which no proof was made as to the necessity therefor and reasonableness thereof.

A. That's true; it's a net credit against the account, that's right." (R. IV, 806).

Montag, Petitioners' accountant, testified on this matter:

"Q. * * * On that analysis of Mr. Rossiter's, there is shown as of July 12, 1954, to be the sum of $76,712.52 in outstanding accounts receivable as of that date, does it not?

A. Yes, sir.

Q. It also shows, does it not, Mr. Montag, a net credit against that amount of $76,712.52, an amount in the reserve adjustment of $16,579.81?

A. Yes, sir.

Q. Now, according to the pleadings of plaintiff and the contract which has been introduced here in evidence and the analysis of Mr. Rossiter which you have before you, Commercial Credit Corporation is charging interest on the entire $76,712.52 since July 12, 1954. Now, *I'll ask you if* under those circumstances *Commercial Credit Corporation is not computing and claiming interest on moneys that it had received* but had not disbursed to the Howard Distributing Corporation?

A. Yes, sir." (R. V, 1178).

The Court of Appeals recognized the failure of proof in respect to the expenses amounting to $170.25 (*post*, pages 7a-8a) yet directed entry of judgment therefor in favor of Respondent (*post*, page 35a), "We hold, therefore, on the record before us there was no substantial issue of fact as to appellant's right to recover * * * $13,013.63 expenses covered by the contract * * *." This $13,013.63 represents all of the expenses for which Respondent sought recovery (R. I, 12).

It was stipulated that only $10,739.02 of the expenses were necessary and reasonable (R. IV, 763). No separate issue was requested or submitted to the jury as to the necessity for, and reasonableness of, the remaining $2,283.61 in expenses for which the Court of Appeals also directed entry of judgment (R. I, 49-56, 57-61). These expenses were primarily for travel of attorneys and witnesses in this case (R. III, 666-7; IV, 774-6).

It is fundamental that Respondent was required to show that such expenses were both necessary and reasonable, and obtain a finding to that effect, before it can recover same. *15 Am. Jur. 550, §141.*

The third of these debit-items consists of $9,144.46 of accounts receivable that were obtained from Howard after the contract terminated. It is Petitioners' contention, and the jury found by its answers to Issues Nos. 1, 14 and 15, that 80% of those invoices, or $7,315.77, is included by Respondent in the principal of its alleged debt of $41,790.12 (R. I, 49, 54).

On Petitioners' rehearing the appellate court found and held that the $7,315.77 was so included and amended its judgment accordingly (*post*, pages 37a-38a).

On Respondent's rehearing the appellate court rescinded its finding, set aside the judgment rendered on the

previous rehearing and reinstated its original judgment, holding that same was not included and the principal of the indebtedness owed by Howard Corp to Commercial Credit on July 12, 1954, was $41,790.12 (*post*, page 42a).

In reaching that conclusion the appellate court said, "We are firm in the conviction, however, that the reading and interpretation of these figures [shown on the ledger sheet] is within the province of the Court and not of the jury" (*post*, page 42a), wholly ignoring the interpretation placed on such accounting record, and the procedures used by Respondent in maintaining it, that were testified to by the officer under whose supervision the record was posted and by the two accountant-witnesses, who had audited the records from which such ledger sheet was compiled.[16]

Each of these witnesses also testified that the credit entries in the ledger sheet were credits for "money paid Commercial Credit by Howard Corp" (see footnote 19, *post*). The appellate court rejected that testimony and substituted its own interpretation of the entries (*post*, pages 16a, 19a-20a).

---

16. Respondent's accountant, Rossiter, explained plaintiff's Exhibit 15:

"A. That was done in effect in this way. As those schedules were bought, a card was opened for each of the customers of Howard, for whom an invoice or invoices were received. As the reports of collection came in and the invoices were cleared, those invoices were cleared on the card as of July 12, 1954. The ledger cards show that there was $76,712 outstanding on these accounts receivable.

* * *

"Q. * * * the individual invoices, or the cards, or whatever you are talking about, that went to make up the seventy-six thousand some odd dollars

A. I will have to have my case from the coat rack to do it I have that trial balance in the case.

Q. And it lists each of those accounts?

A. It lists the individual debtors, it lists the individual unpaid invoices.

The jury in arriving at its answer to Issue No. 1, had the duty to weigh and take into consideration the testimony of those witnesses relating to the ledger sheet and the construction placed thereon by them and by Respondent's Exhibit 15 (see footnote 15, *ante*).

In the opinion on Respondent's rehearing the Court of Appeals frankly admits the difficulty of interpreting both the records of Respondent and the technical accounting procedures employed by it in maintaining those records (*post*, page 42a). It, nevertheless, chose to ignore or disbelieve the construction given thereto by Respondent's

---

Q. All right, sir. Let's have them.

A. (Witness gets his brief case.)

Q. Is that the list, sir?

A. This is the list. It is a trial balance of the accounts unpaid as of July 12, 1954, prepared by Commercial, employees of Commercial Credit, listing by the customer Howard the individual invoices still open or, in the case of a partial payment applied to an invoice, the gross amount of the invoice, the amount of the partial payment applied and the remaining balance.

* * *

Q. That listed each individual account debtor, did it not?

A. Yes.

* * *

Q. May I have that, please, sir?

A. (Witness hands document to Mr. Howell.)

Mr. Howell: We request that this be marked for identification as Defendant's Exhibit 13-B.

(Thereupon the document above referred to was marked for identification by the Reporter as Defendant's Exhibit 13-B.)" (R. III, 722-4.)

* * *

Defendant's Exhibit 13-B (R. V, 1251-62) shows that $9,144.46 of accounts assigned after September 25, 1953, are included in the total of outstanding unpaid accounts from which the principal sum of $41,790.12 is derived (R. V, 1026).

* * *

Respondent's witness, Kratz, testified (R. V, 1002-4) on this matter:

accountant-witness and its officer charged with maintaining the Commercial Credit records, as well as the interpretation placed thereon by Petitioner's accountant-witness, Montag, and boldly proceeds to usurp the jury's function by reweighing the evidence and by judging the credibility of those witnesses.

6. The Court of Appeals held, "Here there was no impeachment of the books [Commercial Credit's].* * * Absent any proof there were errors in other entries * * * the item [alleged $13,098.94 n.s.f. check] must therefore be given effect as a charge against Howard" (*post*, pages 12a-13a), citing as authority for its holding *Wigmore, Vol. V, §1557.*

(a) Among the entries in Respondent's books are debit-items consisting of the unpaid balance on the $46,723.40 of accounts receivable that were obtained from

---

"Q. Well, *Mr. Kratz, you have included in these accounts assigned, in this figure of $76,712.53, all of the accounts which were assigned after August 26, 1953, have you not?*

A. On this list [Exhibit 13-B], which is the April 30, 1958, list, *this is a list of unpaid and outstanding accounts receivable. Whatever amount of invoices that were unpaid on those schedules assigned after September 25th, would appear on this list.* Now, I can't give you any total of what they were.

Q. *You don't know what the totals are but you know they are on the list?*

A. They would be on the list; *whatever amounts were unpaid on those schedules after September 25, 1953, would be on here.*"

* * *

"The Witnesses: Well, after the 25th. It starts with the 26th and subsequent, totaled $42,727.55.

Q. (By Mr. Howell) That's your total. No—

A. May I explain this further before I get through?

The Court: Go ahead.

The Witness: On accounts totaling $3,583.09 the eighty per cent of that was $2,866.47. That figure represents those two checks that we discussed before, one for $2,145.56, and

Howard Corp after August 26, 1953, on which no advancements were made, and 80% of which is included in the principal of $41,790.12, Respondent asserted to be owed to it on July 12, 1954 (R. III, 675-6, 722-4; V, 1002-4, 1026).

On both Petitioners' and Respondent's rehearings the Court of Appeals held, as a matter of law, that such debit-items were an improper charge against Howard Corp (*post*, pages 32a-33a, 37a-38a, 41a); consequently, the debit-entries with respect to such items were likewise erroneous.

The Court in an effort to sustain its holding that Commercial Credit's books were not proven to be untrustworthy by the inclusion therein of those erroneous entries, takes the position that such entries do not reflect on the accuracy of Respondent's books (*post*, page 38a) and that

---

one for $720.91. Those checks were drawn, I think you will recall, and were then taken by us and debited to cash and credited to the reserve adjustment account of Howard Distributing. That's what happened on those two. *The balance of the schedules of accounts totaling $9,144.46, on which eighty per cent was $7,315.56*, were credited to the reserve adjustment account."

. . . .

"Q. All right, sir. Then what you are doing here, are you not, Mr. Kratz, is asking this jury to return a verdict in your favor for $9,144.46 worth of accounts, which were assigned after the contract was terminated and after the guaranty was terminated, are you not?

A. Well, those accounts were merely taken as security for the debt, that's all. Anything that came into our hands would be so much money to reduce the debt. Now, if they produce money, it would reduce debt.

Q. *But you no longer had a contract with anybody, did you?*

A. *Well, the contract was canceled on that date. That's true.*"

. . . .

"Q. (By Mr. Howell) Now, Mr. Kratz, I will ask you if you are not *also* trying to collect from Mr. Sorgel the amount shown in Schedules 1427 and 2619, dated August 26, 1953, and December 4, 1953, which was shown to you and examined by you yesterday, which reflect to be sales of CCC merchandise?

A. *Then are included in the figures, yes.*"

it is province of the appellate court to construe those records, rather than a jury function to draw a conclusion as to the meaning of the entries therein based upon testimony of the accountant-witnesses and the witness charged with keeping the records (*post*, page 42a). The Court thus repudiated the very principles declared by *Wigmore* cited as the basis for its holding that Respondent's books were not impeached.

Book entries are either correct or incorrect. Where the meaning of the entries is placed at issue, as in this case, their accuracy, *vel non*, must be determined by the jury from the greater weight of credible evidence. Should the sophisticism of the appellate court be followed, the untrustworthiness of a party's books could never be demonstrated.

(b) Further, in respect to the findings of the Court of Appeals that the books of Respondent were not impeached (*post*, page 12a) and "there was no substantial issue of fact as to appellant's right to recover the sum of

---

Mr. Montag, Petitioners' accountant, testified (R. V, 1148, 1150-2), on cross-examination:

* * *

"Q. Now, Mr. Montag, this Defendant's Exhibit Number 41, which is a schedule prepared by you, which says, 'Howard Distributing Corporation Accounts'—you have an item up at the top, 'Amount due Commercial Credit Corporation as of September 25, 1953, on cash transactions * * *. Now, I wish you would break that figure down for me and show me where that figure comes from * * *?"

* * *

"Q. Now, let me get you to do the same thing on the next item, *which is amounts due Howard Distributing Corporation as of September 25, 1953, on cash and cash transactions?*

* * *

Q. All right. And your next one?

A. *The next one is accounts assigned after 9-25-53.*

Q. All right.

A. *That's $9,144.46.*"

$41,790.12, as principal amount due on July 12th" (*post*, pages 35a, 42a). Respondent's officer-in-charge of its records and who was its official representative at the trial, Kratz, testified that while giving testimony on the first trial he swore, (1) he never heard of any such figure of $41,790.12, prior to that time; (2) he could not "even identify the figure yesterday until I got a-hold of this statement" [from Commercial Credit's attorneys]; (3) Commercial Credit had no record of any such figure of $41,790.12; (4) he could not identify the accounts that made up the amount of $41,790.12; (5) "Commercial Credit had no outstanding accounts receivable amounting to this figure of $41,790.12," and, (6) the claim alleged in Commercial Credit's complaint: "the aggregate amount of unpaid advancements made by plaintiff to Howard Distributing Corporation under said contract and its guaranty by defendant, Sorgel, on said corporation's accounts receivable was $41,790.12," *was in error* (R. V, 1012-16, 1018).[17]

In *Broad River Lumber Co. v. Middleby*, 197 Fed. 817 (C.A. 4-1912), the Court said:

> "Inasmuch as this is the defendant's own testimony, it should be binding upon him as to the amount * * *"

The holding in that case is in accord with the law relating to the binding effect of a party's own testimony. The opinion here under attack is in conflict with the federal decisions on this fundamental principle.

---

17. "Q. *Can you identify the accounts which go to make up this figure of $41,790.12?*

A. *I can only identify the—I mean I can't identify specific accounts that would make that total.* * * *

Q. Isn't it a fact upon the last trial of this cause that you testified on October 9, 1952, that you could not identify any accounts which went to make up the $41,790.12?

A. Well, I say [*sic*] * * I did now, that *there is no specific accounts receivable amounts that would total $41,790.12.*"

(c) Respondent's Vice-President, Rogers, testified that Kratz swore falsely in answer to defendants' request for admissions Nos. 10, 11, 38 and 41 (R. III, 483-88). Kratz also testified that his sworn answers to those requests were false (R. IV, 812-17).

The veracity of Respondent's officer charged with posting and maintaining its records being thus impeached, the trustworthiness of the records kept under his supervision was an issue for the jury. *Wigmore*, Vol. V,

---

Q. *I will ask you if you had ever heard of this figure of $41,790.12 before you testified on October 9, 1957?*

Witness: *I made that answer at the former trial, yes.*

* * *

Q. *Isn't it a fact that Commercial Credit Corporation had no outstanding accounts that went to make up the figure $41,790.12 at the time you testified on October 9, 1957?*

A. Yes. I said at that time that we had no specific receivables that would add up to or make up that figure.

Q. *I will ask you if this identical question wasn't asked, and this answer given by you. In other words, you have no outstanding accounts receivable amounting to this figure of $41,790.12 according to your testimony, is that right?' Answer: 'That's right.'*

A. No specific figure that would make up $41,790.12, no figures. * * *

Q. *Isn't it a fact that the allegation contained in paragraph 9 of the amended complaint is in error?*

A. *What it is—I don't know what it is?*

Q. *I just read it to you.*

A. Just read what?

Q. The allegation in paragraph 9 of your third amended complaint.

A. * * * supposed to remember that right now?

* * * *

Q. *I will ask you if upon the last trial of this cause this question was not asked, and this answer given by you: 'Let's see what you allege here, whether or not it was an accounts receivable figure. This is your pleading, Mr. Kratz. As of November 30 the aggregate amount of unpaid advancements paid by plaintiff to Howard Distributing Corporation under said contract and its guaranty by Sorgel on said corporation's accounts receivable was $41,790.12. Answer by you: Well, then it was in error, because that is not the figure.'*

§1557(1). Although the appellate court adopted this section of *Wigmore* it refused to apply this evidentiary principle announced therein.

Commercial Credit's right to, and the amount of, recovery was submitted to the jury in one ultimate issue—the amount, aside from attorneys' fees, due Commercial Credit from Howard Corp as of April 30, 1958 (R. I, 49).

This issue embraced three elements of recovery, *viz.*, principal sum, unpaid service charges and unpaid expenses.

Commercial Credit interposed no objection to the submission of its ultimate issue in such form, nor did it request issues be separately submitted on either of the three elements embraced therein (R. I, 57-64).

Respondent had the burden in the Court of Appeals of showing, by undisputed evidence, that it had established its right to, and amount of, each of the three elements of recovery submitted in its one ultimate issue. The mere fact that its ledger sheet was admitted in evidence, under 28 *U.S.C.A.* §1732, does not render conclusive the correctness

---

A Well, Mr. Howell, that's probably what I answered at the trial."

. . .

"Q (By Mr. Howell) All right, sir. I will ask how it was you didn't testify on October 9, 1957, upon the last trial of this cause that Commercial Credit Corporation had no record of the figure of $41,790.12?

A Mr. Howell, doesn't that get to the explanation that I made previously that—

The Court: He is asking you what you testified to.

The Witness: Yes, that's true, yes, that's true.

Q (By Mr. Howell) All right. Did I understand you did so testify?

A That's right".

. . . .

The testimony of Kratz given on the first trial and filed among the papers in this case before the second trial, is set forth in Vol. VI, at pages 1365-70 of this record.

of the entries therein in respect to the three elements of recovery. *Woodsworth* v. *Commissioner of Internal Revenue Service*, 218 F.2d 719 (C.A. 6-1955), wherein the Court held:

> "Book entries are, of course, not conclusive but are evidential."

The opinion here under attack is in direct conflict with the decision in that case.

Departure of Court of Appeals from the Accepted and Usual Judicial Proceedings.

7. Petitioners, by way of derivative counterclaim, sought to recover for Howard Corp the value of merchandise that was returned by account-debtors after August 26, 1953, and placed under the exclusive control of Commercial Credit, and the "non-purchased" accounts receivable acquired by Respondent also after August 26, 1953, on the theory that Commercial Credit exercised its election under Section Second (1) of the contract (*post*, pages 46a-47a) to accept and apply that merchandise and those accounts as payments on the indebtedness it was asserting against Howard Corp (R. I, 25, 26-27, 35-6).

The jury found that such merchandise and accounts were so accepted and applied by Petitioner, Issues Nos. 10, 16 and 17 (R. I, 52, 54-5). The Court of Appeals held there was no evidence that Respondent exercised its option under the contract and elected to apply that merchandise and those accounts receivable as payments (*post*, pages 17a-18a).

That the appellate court did not even mention or consider the evidence pertaining to, or the effect of, the failure of Respondent to account for $25,794.44 worth of this re-

turned merchandise will be presented under point 12, *post*, pages 57-9.

(a) The conclusion of the Court of Appeals, there was no evidence disputing the testimony of Respondent's witnesses that the accounts receivable obtained by Commercial Credit after August 26, 1953, and for which it made no payments, were taken by Commercial Credit merely as additional security (*post*, page 13a), could only have been arrived at by ignoring all evidence favorable to Petitioners on this issue (R. II, 267, 319, 338-9, 377; see footnotes 19, 20 and 21, *post*), including Respondent's written admission against interest.[18]

(b) The conclusion of the Court of Appeals that the credit-entries in Respondent's ledger sheet of the $46,743.40 of accounts receivable, obtained by it after August 26, 1953, and for which it advanced no funds, were not credits for cash and were nothing more than potential credits (*post*, pages 15a-16a), could only have been reached by that Court substituting its interpretation of such record for the interpretation placed thereon by both of the expert accountant-witnesses, Rossiter and Montag, and by the officer, Kratz, under whose supervision the record was

---

18. Following the execution of the contract Commercial Credit sent Howard Corp instructions to be followed by Howard Corp in maintaining its records of the assigned invoices (R. V, 1020-1), which instructions (R. I, 222) contained this declaration:

> "You borrow no money from us, but SELL US OUTRIGHT certain specific invoices, MARKING YOUR RECORDS so that our accounts can be easily identified. All customers' original checks, notes, drafts, acceptances, etc., received in payment of, or on account of invoices sold us are OUR PROPERTY and not yours, and they MUST BE FORWARDED to us and NEVER DEPOSITED BY YOU as they are NOT YOUR PROPERTY."

maintained, *id est*, such credit-entries were credits as for "money" Howard Corp paid to Commercial Credit."[19]

8. The finding made by the Court of Appeals "there was no evidence of an exercise by Commercial of any option [under Sec. Second (1) of the contract] to convert the accounts held as security into accounts taken at their face value as payment" (*post*, page 18a) upon which it concluded, "there was no basis for the submission to the

---

[19] Rossiter defined "credits" as used by Commercial Credit in posting credits to its ledger sheet:

"Q. Now, simply, a debit is the amount of money owing, isn't it, and a credit is the amount of money collected, is that right?

A. When you are looking at an account receivable, a debit is a charge against the debtor, money which the debtor owes to the creditor.

Q. That's right.

A. *And a credit would represent a credit to the debtor, which would be money that the debtor pays to the creditor.*

Q. Right. *Now, in this instance, it would mean—a debit would mean the amount of money that Howard Distributing Corporation owed to Commercial Credit?*

A. *Yes.*

Q. *A credit would mean the amount of money that the Howard Distributing Corporation paid to Commercial Credit?*

A. *Yes.*" (R. III, 682-3).

Kratz testified that the credits were:

"Q. *You heard your accountant testify* on the stand here yesterday or Friday I believe, did you not, and he testified *that in maintaining accounting records, that a debit meant the amount owed, and a credit meant the amount collected. Now, do you keep some other, different type of bookkeeping?*

A. *No, we don't keep any other than these ledger sheets here.*

Q. *Well, does your word 'credit' that you used on there mean something different than what it is normally used in bookkeeping circles?*

A. *No.*" (R. IV, 864-5).

Montag testified as to the credit entries:

"Q. Does that ledger sheet show that those sums were to be anything other than a credit against the Howard Distributing Corporation indebtedness as of September 25, 1953?

jury of the special issue as to whether Commercial Credit had accepted $46,723.40 worth of accounts receivable subsequent to August 26, 1953, to be credited upon Howard's account with it" (*post*, page 19a) is directely contrary to the testimony of the witnesses who testified on this matter.

(a) The representatives Respondent placed with Howard Corp testified they requested and were given the accounts receivable Respondent acquired after August 26,

---

A. No, sir.

Q. Therefore, Mr. Montag, there being no evidence on the ledger sheet showing to the contrary, didn't you as an accountant have to assume that the credit shown thereon meant exactly what the ledger sheet shows them to be?

A. Yes, sir.

Q. That is, credits against the Howard Distributing Corporation indebtedness as of September 25, 1953?

A. Yes, sir.

Q. Now, the term 'credit' as used in accounting circles has been defined by Mr. Rossiter, the Commercial Credit Corporation's accountant, during the time he was testifying here, to mean a credit against indebtedness; that is, a reduction of the debt by the amount of credit. Do you agree with that definition?

A. Yes, sir.

Q. Is that the accepted definition of 'credit' in accounting circles?

A. Generally, yes, sir.

Q. Is there anything on that ledger sheet of Commercial Credit to show any other meaning should be given to the credits shown thereon?

A. I don't think so." (R. V, 1175-6).

Kratz further testified:

"Q. (By Mr. Howell) Is there any memorandum, suspense column, or items, or notations, on the ledger sheet showing that Commercial Credit intended those credits to be other than *cash* credits?

A. Well there is no notations on the ledger page.

Q. Are there any memorandum on the ledger page?

A. No." (R. IV, 1023-4).

1953, and that same were accepted by Commercial Credit *in replacement* of accounts receivable previously assigned.[20]

(b) Commercial Credit did exercise its option, under Sec. Second (1) of the contract, to convert at least three of the schedules of accounts receivable, obtained by it from Howard Corp after August 26, 1953, totaling $10,371.46, into "accounts taken at their face value as payment" by issuing its own checks therefor and crediting the proceeds, as cash, against the indebtedness it was asserting against Howard Corp. Respondent's officers further testified that all accounts receivable acquired after that date could have been similarly treated, and if such had been done the results

---

[20] Respondent's representative, Braken, testified:

"Q. (By Mr. Trueheart) Did you agree to accept any bills?
A. If he was making sales at the time, I believe I would have, probably did, accept a few schedules of accounts to help make up shortages that were due, at least prior to the date of termination." (R. II, 267).

* * *

"Q. (By Mr. Howell) Did you prepare any schedule of accounts to send in to Commercial Credit?
A. * * * if they were still selling merchandise, it would be reasonable that *I would*, to make good any shortages, to *accept additional accounts in replacement.*" (R. II, 319).

* * *

"Q. Well, that was not taken in payment of a debt, was it?
A. * * * I don't know what it was, but that's what we did." (R. II, 336)

* * *

"Q. If you had an account for $10,000, which was not paid or which was returned merchandise, and a new account for $10,000 came in while you were there, *you substituted a new account of $10,000 for the one that returned merchandise or hadn't paid off, wouldn't you?*
A. *We accepted the new account, advancing no funds against these.*" (R. II, 339).

Respondent's representative, Weber, testified:

"The Witness: A. I myself did not see any schedules. I had requested schedules to cover accounts that we did not consider good, and I was given schedules by the Howard Distributing Corporation." (R. II, 377).

would have been the same as it had already accomplished by crediting the remainder of such accounts as "money paid by Howard Corp."[21]

The opinions of the Court of Appeals are self-evident that it completely departed from the accepted and usual judicial proceedings by, (1) accepting evidence favorable to the appealing party instead of viewing the evidence in a light most favorable to the party prevailing in the District Court, (2) placing the burden upon the party prevailing in the District Court of showing there is an evidentiary basis to sustain the findings reached by the jury rather than requiring that the appellant carry the converse burden, (3) substituting fact-findings and conclusions that are contrary to those found and drawn by the jury from conflicting evidence, (4) substituting its interpretation of

---

21. Respondent's accountant, Rossiter, testified:

"Q. Now, I ask you whether or not the ledger sheet reflects that after August 26, 1953, the Commercial Credit credited Howard Distributing Corporation with the accounts receivable which were assigned to it after August 26, 1953, which you say amount to $56,879.53?

A. *They were*—included in that figure are those four checks, which are the accounts relating to those four checks, which were drawn after the 26th of August

Q. I understand that, sir.

A. And if the issuance of *those four checks* is considered as crediting Howard Distributing Corporation, then they *were credited*.

Q. *Well, what about the remainder of the accounts?* Doesn't that ledger sheet reflect that the remainder of the accounts were likewise credited?

A. *They were credited.*" (R. III; 685)

• • •

"Q. *Well, so far as your accounting was concerned*—I am not talking about what your accounting shows; I am talking *about what that ledger sheet shows—whether they had ever charged them or not, they gave them as credits on the ledger sheet, did they not?*

A. *Well, the credit was to Commercial Credit's cash account*

Q. That's right.

technical accounting records and procedures for those testified to by the person charged with keeping the records and by expert certified public accountants, and (5), reversing the judgment on conflicting conclusions derived from the same facts.

Phoenix Indemnity Co. v. Girouard, 252 F.2d 146 (C.A. 5-1958); *Millers' National Insurance Co. v. Wichita Flour Mills Co.*, 257 F.2d 93 (C.A. 10-1958), in which latter case it is said:

A That's right. *They appear as credits to Commercial Credit's cash account on the ledger sheet.*

Q In other words, *they are cash credits, aren't they?*

A *To the cash of Commercial Credit.*" (R. III. 692)

* * *

Q They could have just as well issued checks for the full amount, could they not?

A What full amount?

Q Well, the entire fifty some odd thousand dollars that they received after August 26, 1953 that you testified to, could they not?

A That could have been done." (R. III. 739-40)

* * *

Q So it amounts to the same thing, does it not, they just never got around to reducing those in the reserve adjustment to cash, did they, as they did on those three?

A That's right. (R. III. 740)

Respondent's Vice-President, Rogers, testified:

"Q All right, sir. I now hand you three checks, or refer you to three checks which I believe you are familiar with. Will you identify those, the last check, those three checks, please sir, starting with the first one I point out to you?

A Which is the first one, Mr. Howell, the number?

Q This check here, number—

A C-8692

* * *

Q (By Mr. Howell) I will ask you the dates on those checks please, sir?

A C-8692 [illegible] September 28, 1953, C-8673 is dated September 23, 1953, and C-8[illegible] is dated September 22, 1953.

Q I ask you if those checks were ever actually delivered to the Howard Corporation or whether or not they were merely

"The appellate court takes the view of the evidence most favorable to the prevailing party and will uphold the verdict if there is substantial evidence to support it."

In *Hedger v. Reynolds*, 216 F.2d 202 (C.A. 2-1954), the court held

"The burden on an appellant, who seeks to reverse a judgment for error in fact, to show that essential findings are clearly erroneous, is, indeed a heavy one when, as in this instance, decision must turn largely upon the credibility of witnesses the trial court saw and heard testify. Rule 52 (a), F.R.C.P., 28 U.S.C.A.; United States v. Aluminium Company of America, 2 Cir., 148 F.2d 416, 433; Moore v. Ford Motor Co., 2 Cir., 43 F.2d 685."

run through your books, and the Howard Distributing Corporation credited with the amount of these three checks?

"A *Those three checks actually never were sent to Howard Distributing Company. We ran them through our bank and credited their account with them.*" (R. III, 451-2)

Respondent's officer-in-charge of the record, Kratz, testified

Q. Now, I will ask you if on the last trial of this cause when we were talking about this same situation, that you didn't testify that on each of the accounts which were assigned to you after August 26, 1953, you either got checks or gave cash credit for [illegible]

A. Well, I know we [illegible] issued checks for credits went into the reserve adjustment [illegible]

Q. *And you issued your checks for those, did you not?*

A. *Yes, sir.*

Q. *And you could have done just as well and issued checks in the remaining of the accounts, which were assigned after August 26, 1953, on which you paid no money to Howard, couldn't you?*

A. *Yes, that could have been done, and the checks kept and credited to reserve, but it would be the same result, I suppose.*" (R. IV-867-91)

Error of District Court in Holding Guarantor Liable on His Guaranty.

9. The contract of guaranty was joint and several. It was executed by William R. Sorgel, Dorothy L. Foster and Robert Howard and was to be construed and governed according to the laws of the State of Illinois (R. I. 136-8).

All three of the guarantors were sued by Respondent (R. III. 584-7).

Prior to trial, the District Court entered its order granting Respondent's motion to dismiss the defendant-guarantors, Dorothy L. Foster and Robert Howard, from the case with prejudice, at Respondent's cost. This motion to dismiss his coguarantors was objected to, and contested by the remaining guarantor, William R. Sorgel (R. I. 3; VI. 1375).

This error was put to, and overruled by, the Court of Appeals, citing as authority for its action §123, *Restatement, Law of Contracts* and §135, *Restatement, Law of Surety*. It refused to follow the law as announced by the courts of Illinois in *Rice v. Webster*, 18 Ill. 331 and *Clark v. Mallory*, 56 N.E. 1099, in which latter case the Supreme Court of Illinois said:

> "We think the instrument which plaintiff in error admits he executed is a plain, absolute, unconditional and unambiguous release of a joint debtor * * *, and, being such, operates in law to discharge the coobligor. Earnscleugh v. Lawarance, supra; Winslow v. Leland, 128 Ill. 304, 21 N.E. 568."

In *U. S. v. Warner*, 211 F.2d 669, the Seventh Court of Appeals in a case arising in the State of Illinois, involving the application of the law of that State as to the effect of a release of one of two joint and several obligors for taxes assessed on distilled spirits under 26 U.S.C.A., §2800

(d), held that, under the Illinois law, the release of one "joint and several" obligor released the other:

> "The common law rule is that a release of one of two or more joint and several debtors releases all unless the creditor reserves his rights against those not expressly released. 76 C.J.S., Release, §49, page 678. The Illinois courts have apparently followed this rule, but not without exception."

The Court after discussing the decisions of the Illinois courts on this question, including those cited hereinabove, proceeded to hold:

> "But here the Federal law in describing the liability simply provides that it should be 'joint and several', words which then had an established and definite common law meaning. In the section governing the compromise of such liability Congress could have provided, but did not, that the release of one of the obligors should not discharge the other. *We must therefore look to the common law to determine the effect of the release of less than all of the several joint obligors. From our investigation of the common law, with which the Illinois decisions seem to be in substantial agreement, we are convinced* that in this case *if the release* of Braverman *was without any savings clause to show that the intention of the parties was to keep alive the liability* of Wainer, *the release of Braverman must be considered as also releasing Wainer.*" (Emphasis added)

The decision in *U. S. v. Wainer, supra*, is in accord with the decisions of the Illinois courts holding that the release of a "joint and several" guarantor over the objection, or without the consent of, the coguarantors operates to discharge all. The decision under attack is in direct conflict with the decisions of the courts of Illinois and the decisions of the federal courts applying the law of that State

to the release of one of several "joint and several" guarantors.

10. At the time of the execution of the Commercial Credit-Howard Corp contract by the officers of Howard Corp and prior to Commercial Credit accepting the said contract, the latter required and caused to be adopted a resolution by the board of directors of Howard Corp (R. I, 168-9). This resolution (R. I, 170), provides that Howard Corp had entered into a contract with Commercial Credit:

> "For the *sale* of certain accounts" etc., "herein called 'Instruments', * * *, which contract has been read and examined by the Directors of this corporation.
>
> "That the said contract be and is hereby approved and the action of the Officers of this Company in making said contract on behalf of this Company is hereby ratified and confirmed. * * *
>
> "*That any Officer of this Company be and is hereby authorized* to execute any future contracts with said Commercial Credit Corporation, and on behalf of this Company, *to execute any schedules, assignments and or endorsements of instruments, transferring all right title and interest of this Company in and to all Instruments sold or to be sold to Commercial Credit Corporation under the aforementioned contract* * * *" (Emphasis added).

This resolution and the contract, as signed by the officers of Howard Corp, together with the executed guaranty were delivered to and considered by the credit committee of Commercial Credit in determining whether the proposed contract with Howard Corp should be accepted (R. II, 254-6). All of which was prior to the acceptance of said contract by Commercial Credit on April 28, 1953 (R. II, 278-80).

The record does not reflect that any other or further resolutions, in respect to the contract, were adopted by the board of directors of Howard Corp.

Nor does the record show that the officers of Howard Corp were vested with any authority from the directors of that corporation to contract with Commercial Credit except as is specifically granted in the resolution, dated April 17, 1953, viz., "for the *sale* of accounts", etc., and to execute certain documents "transferring all right, title and interest of this Company in and to all instruments *sold or to be sold to Commercial Credit Corporation.*"

The District Court found and held that, as a matter of law, the Commercial Credit-Howard Corp contract, dated April 17, 1953, was one for loans upon the accounts assigned to Commercial Credit by Howard Corp (R. I, 95). The Court of Appeals affirmed (*post*, page 3a).

Both parties plead (R. I, 6, 36, 40), and the undisputed evidence showed, that the Howard Corp was organized and chartered under the laws of Texas (R. III, 599-613).

The Petitioners affirmatively plead the invalidity and unenforceability of both the principal contract and the collateral guaranty obligation by reason of the lack of authority of the officers of Howard Corp to enter into a contract with Commercial Credit to pledge and make loans upon the corporation's accounts receivable; and, that Commercial Credit had knowledge of the limited authority of the officers and agents of Howard Corp prior to acceptance of the principal contract (R. I, 32-3).

This defense was duly urged in Petitioners' motions for directed verdict made at the close of plaintiff's testimony and again at the close of all the evidence, and same

was overruled by the Trial Court (R. VI, 1386, 1374, 1376-7). It was put to the Court of Appeals by Petitioners' first specification of error on cross-appeal and denied without comment (*post*, pages 1a-42a).

The Howard Corp being a Texas corporation the management of its affairs was governed by the laws of Texas. *Art. 1327, V.A.T.S.*, Directors' powers, provides in part:

> "The directors shall have the general management of the affairs of the corporation. * * *."

It is the rule in Texas that the borrowing of money and methods of obtaining loans are affairs of the corporation of which the directors have the control. *Cameron v. First National Bank*, 194 S.W. 469 (err. ref.), wherein the Galveston C.C.A. applies *Art. 1327* to that rule:

> "The borrowing of money in conducting the business of the company and the means and method by which the necessary loans could be obtained were certainly affairs of the corporation committed by the statute to the management of the directors * * *."

The board of directors of the Howard Corp, acting in accordance with the above statute as construed by the courts of Texas and pursuant to a requirement of Commercial Credit, adopted the resolution defining the contractual authority of its officers. The language used in the resolution is clear and precise. It is not appended with, nor perverted by, the covinous wordage and deceptive phraseology as are used in the principal contract.

The Supreme Court of Texas, by dismissal of application for writ of error, approved the holding of the Ft. Worth C.C.A. in *R. R. Spencer & Co. v. Thorp Springs Christian College*, 41 S.W.2d 482, wherein the authority of an officer of a college, a corporation, to execute a note on

behalf of the college was placed at issue. The Court in holding that such officer lacked the authority to bind the college, said:

> "In the case of Vacarezza v. Realty Industrial Co., (Tex. Civ. App.) 165 S.W. 516, 517, the court in its opinion, among other things, said:
>
> 'A corporation, being a creature of the law, must act and be bound as the law provides. Parties dealing with it are charged with the duty of knowing this. They must know that whatever power the agent has is derived from the board of directors.'"

The fact that the resolution states the directors had read the contract prior to passage of the resolution would be immaterial in light of the testimony of Respondent's officers that the directors could not determine the contract to be a lending device from reading same (R. I. 178-87, II. 322-4) and the testimony of one of the officers and directors of Howard Corp that he understood, from reading the contract, that it was for the sale of accounts receivable (R. V. 1224-7). The jury accepted this evidence by its answer to Issues Nos. 6, 7, 8 and 9 (R. I. 50-2).

This resolution must also be viewed in the light of Howard Corp's official application to Respondent for the latter to, "enter into a *contract to purchase* accounts receivable". (R. II. 259; emphasis added).

Right of the Court of Appeals to Direct Entry of Judgment for Respondent Where the Evidence Establishes That Some Money Was Owing on the Counterclaim.

11. The conclusion is inescapable that, under the criteria for determining whether Howard Corp. was indebted to Respondent, or vice versa, when the contract

terminated, the evidence was conflicting on the amount due as principal at that time (*ante*, page 17) and was likewise contradictory as to the correctness of the debit-entries in respect to the alleged n.s.f check and the balance due on the Skillern & Son and Ward Drug accounts (*ante*, pages 20-30).

Regardless of which sum the jury selected from the conflicting evidence as being the amount of principal owing at termination of the contract (footnotes 6-9, *ante*), it necessarily found by its answer to Issue No. 1, that Respondent's officer charged with keeping its records and those records were not worthy of belief, the entry pertaining to the alleged n.s.f. check was erroneous or fictitious, that Commercial Credit could have, but did not, collect the $1,409.18 from Ward Drug and the amount owing on the Skillern & Son account was $384.60 instead of the $32,500.53 claimed by Commercial Credit. The Court of Appeals therefore, did not have the right to set-aside the conclusions of the jury that nothing was due Respondent from Howard Corp and conversely that it was indebted to Howard Corp when the contract and guaranty terminated (Issues Nos. 1 and 19).

The jury's findings that nothing was due Respondent from Howard Corp, *as of April 30, 1958*, is also sustainable for the reason the jury in arriving at such answer found, *ex necessitate quaere*, that included in the principal sum of $41,790.12, Respondent contended was owed to it by Howard Corp, was 80% of the outstanding accounts receivable for which Howard Corp received no payments and that included in the $39,739.87 of service charges, Respondent's accounting-witnesses testified was due it from Howard Corp on April 30, 1958, was interest on the $19,579.81 it had recovered and applied as a payment on July 12, 1954.

12. There is a further item which entered into the jury's deliberations that was not considered or even mentioned by the Court of Appeals, from which the jury could conclude that Commercial Credit's records were not worthy of belief and which, with what has been shown, should decisively convince this Court that the Court of Appeals in reversing the judgment of the District Court and directing entry of a money judgment for Respondent deprived Petitioners of the rights guaranteed to them by the Seventh Amendment to the Constitution.

Merchandise of the invoice value of $68,445.56 was returned by account-debtors, placed under the control, and stored in various warehouses by and in the name of Commercial Credit (R. II, 268-70, 361, 380-3; IV, 890, 902, 905, 907). Respondent admits this fact (page 49 of its first brief in the Court of Appeals). This returned merchandise was turned over to, and stored by, Commercial Credit during the period from August 26, 1953, to December 4, 1953, and all of it was moved to, and concentrated in, the Texas Bonded Warehouse, San Antonio, Texas, prior to the judicial sale (R. I, 13; II, 382-3; IV, 890). This fact is also admitted by Respondent (pages 31-2 of its reply brief in the Court of Appeals). There can be no factual dispute about Respondent exercising absolute control over such merchandise to the exclusion of Howard Corp and Petitioners (R. IV, 882; V, 1082-3, 1090-4).

Upon application of Respondent, all of the merchandise, then on hand, was sold at a judicial sale on March 2, 1956 (R. V, 1216-17).

Montag testified, and his is the only evidence on the matter, that Commercial Credit had remaining on hand at the time of, and which was sold at, the judicial sale,

only $42,013.93 worth of such returned merchandise (R. V. 1130-2).[22]

The only withdrawals shown to have been made from the returned merchandise are the sales covered by the invoices in Assignment No. 1427, dated October 26, 1953, of $30.09 (R. V. 1139) and in Assignment No. 2619, dated December 4, 1953, of $670.10 (R. V. 1140), totaling $637.19.

The difference between the total amount of merchandise turned over to, and stored by Commercial Credit, and the amount thereof it had remaining at the time of the judicial sale was $26,431.63; of which only $637.19 is accounted for, leaving $25,794.44 of such merchandise for which Commercial Credit made no accounting or explanation. The records of Commercial Credit, placed in evidence, do not show the manner by which it disposed of this "unaccounted for" merchandise or the amount Respondent received therefor, nor are any credits for same given therein to Howard Corp (R. III, 649-63), although its officer,

---

22. "Q. Do you have a copy of the notice of sale which was published in this case upon the judicial sale of E-Z Rid and Fab Spray?

A. Yes, sir.

Q. Have you checked that against the records of the Howard Distributing Corporation as to what those products listed therein were being sold for through the year 1953?"

* * *

A. You mean the total amount of all of it?

* * *

Q. * * * well, yes. First, I am asking you if the records reflected that Howard was selling the various products for during the year 1953, that is, pressurized cans of Fab Spray, quarts, and so forth?

A. Yes, sir.

Q. All right, sir. Now, what did the total of the merchandise which is listed in that order of sale * * *?

A. The total of the items would amount to $42,013.93.

Q. Of all of the items?

A Of all the items."

Kratz, testified Respondent maintained records of the returned merchandise (R. IV, 838-9, 878).

When this discrepancy was once established the burden was upon Commercial Credit to account for this $25,794.44 of merchandise or explain its inability to do so. And having failed to do either, the jury had an additional evidentiary basis from which it could conclude that nothing was due Commercial Credit from Howard Corp. but conversely it was indebited to Howard Corp.

Summary.

Obviously the Court of Appeals either decided to ignore the evidence favorable to Petitioners, or chose to disbelieve it, nor did it apply the proper legal test to the standard of proof necessary to sustain the verdict of jury and the judgment rendered thereon. In *Revlon, Inc.*, v. *Buchanan*, 271 F.2d 795 (C.A. 5, 1959), that Court held:

> "The quantity and quality of proof necessary to make out a case for submission to a jury in a federal court are determined by the Seventh Amendment to the Constitution of the United States, the Federal Rules of Civil Procedure and the decisions of the courts of the United States. White v. New York Life Ins. Co., 5 Cir., 1944, 145 F.2d 504; Wright v. Paramount-Richards Theatres, 5 Cir., 1952, 198 F.2d 303; Reuter v. Eastern Air Lines, 5 Cir., 1955, 226 F.2d 443; and Continental Casualty Co. v. Holmes, 5 Cir., 1959, 266 F.2d 269; and cf. Dick v. New York Life Ins. Co., 1959, 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935."

The opinions of the Court of Appeals are, *per se*, ample proof that the Court of Appeals chose to ignore the restriction placed on it by the United States Supreme Court and reweighed the evidence in order to arrive at conclusions different from those drawn by the jury. In *Sentilles* v. *Inter-Carribean Shipping Corp.*, 361 U.S. 107, 4

L. Ed.2d 142, 80 S. Ct. 173 (November, 1959), this Court restated the very substance of jury trials guaranteed by the Seventh Amendment. The function of the jury is said to be:

> "To select from among conflicting inferences and conclusions that which it considers most reasonable;"

as to the power of appellate courts, it was said:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

It is also apparent, from what has been demonstrated, that the decision of the Court of Appeals is in conflict with the decisions of this Court and other Courts of Appeals, as well as its own decisions on the principles of law here involved, and that it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision under Rule 19-1(b), Supreme Court Rules.

CONCLUSION.

For the reasons advanced above, a writ of certiorari should be granted.

Respectfully submitted,

LEON P. HOWELL
1412 Alamo National Building
San Antonio, Texas
Attorney for Petitioners

BRADFORD F. MILLER
519 Majestic Building
San Antonio, Texas
Of Counsel